

**UNITED STATES DEPARTMENT OF LABOR
BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K ST., N.W., SUITE 400
WASHINGTON, DC 20001**

Date: September 24, 1997

Case No.: 96-INA-231

In the Matter of:

DUNKIN DONUTS,
Employer,

On Behalf of:

JOEL MOROCHO,
Alien.

Appearance: George W. Echevarria, Esq.
For the Employer/Alien

Before: Burke, Guill, and Vitonne
Administrative Law Judges

DECISION AND ORDER

PER CURIAM

The above-entitled action arises from an application for alien labor certification filed on behalf of Joel Morocho ("Alien") by Dunkin Donuts ("Employer") pursuant to Section 212 (a)(5)(A) of the Immigration and Nationality Act, as amended, Title Eight, United States Code, Section 1182(a)(5)(A), and the regulations promulgated thereunder at Title Twenty, Code of Federal Regulations, Part 656¹. The Certifying Officer ("CO") of the United States Department of Labor denied the application for labor certification and Employer requested review of that decision pursuant to Part 656.26.

Employer applied for certification for the position of Baker in a donut shop and required one year experience in the job offered. No other requirements were listed. Employer received six

¹ Unless otherwise noted, all further citations to the Code of Federal Regulations shall be to Part 656.

applications. Only one, from Michael Landon, merits discussion. His resume indicated experience as a "Baker/Supervisor" from August 1992 to present.² (AF 71.) Employer rejected the six applicants, including Mr. Landon. Mr. Landon was rejected because he had "no experience making donuts, never showed up for scheduled appointment." (AF 76.) The state employment service sent Mr. Landon a recruitment survey and he indicated that he had not been contacted by Employer. (AF 69.) Another applicant, Michael Clayton, whom Employer rejected because he "never returned calls made on various dates and times," (AF 76), indicated like Mr. Landon, that he had never been contacted. (AF 57.)

The CO issued a Notice of Findings ("NOF") on September 21, 1995, questioning, among other things, Employer's good faith recruitment. (AF 85.) The CO questioned Employer's recruitment because of the rejection of several applicants, including Mr. Landon. On November 20, 1995, Employer filed a rebuttal. Concerning Mr. Landon and the other applicants, Employer stated:

8. The statement contained in the Notice of Findings that "Employer rejected all applicants for lack of experience making doughnuts. Employer rejected Mr. Speaker based on resume review and the remaining applicants stating that he could not contact them telephonically" and that "Employer's failure to use postal means of contact does not support a position of good faith recruitment" are specifically rejected as unwarranted and unsupported.

9. It is respectfully submitted that Employer made good faith reasonable efforts to contact the applicants whose resumes were forwarded by the New York State Department of Labor.

(AF 133-34). On November 30, 1995, the CO issued a Final Determination denying certification on the basis that Employer failed to demonstrate good faith recruitment in view of the rejection of Mr. Landon and the other applicants. Employer appealed to the Board.

DISCUSSION

Although the regulations do not explicitly state a "good faith" requirement in regard to post-filing recruitment, such a good faith requirement is implicit. *H.C. LaMarche Enterprises, Inc.*, 87-INA-607 (Oct. 27, 1988). An employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisement. *Showtech, Inc.*, 95-INA-315 (Feb. 11, 1997). Where an employer's statements concerning contact are contradictory and unsupported, the CO may properly give greater weight to applicants' statements that they were not contacted. *Wah Yuan Trading Corp.*, 94-INA-507 (Nov. 14, 1996); *Robert B. Fry, Jr.*, 89-INA-6 (Dec. 28, 1989).

² "Present" means January 24, 1995 which is the date the Alien Employment Certification Office received the resume.

In the instant case, Employer rejected Mr. Landon on the basis that he lacked "experience making donuts." (AF 76.) However, Employer failed to state "making donuts" as a requirement for the position on the ETA 750A or the advertisements for the position of Baker. *See* (AF 33, 38). Mr. Landon's present position as Baker/Supervisor indicated at least two years and five months of experience, from August, 1992 to January, 1995. Aside from Mr. Landon's lack of experience making donuts, Employer did not otherwise challenge his qualifications. Accordingly, Mr. Landon was seemingly qualified for the position and Employer unlawfully rejected him on the basis that he lacked experience making donuts.

Employer's recruitment report in which it states that Mr. Landon failed to answer "various telephone calls" is contradicted both by Mr. Landon's and Mr. Clayton's recruitment surveys. Mr. Clayton, like Mr. Landon, was rejected partly because he allegedly failed to return "various" telephone calls. No evidence corroborates Employer's contention that he had made "various" telephone calls to these applicants. Because these applicants' surveys corroborate each other, and because no evidence corroborates Employer's version of the recruitment, we find the applicants' version of recruitment more plausible than Employers'. Accordingly, we find that Employer failed to recruit in good faith.

Employer argues that the Department of Labor unreasonably requires employers to contact prospective applicants. (AF 159). Nonetheless, the longstanding practice of the Board has been to require employers to timely contact U.S. applicants. *See Foster Electrical Services, Inc.*, 88-INA-284 (June 30, 1989); *Loma Linda Foods, Inc.*, 89-INA-289 (Nov. 26, 1991) (en banc) (holding that failure to timely contact U.S. applicants indicates a failure to recruit in good faith); *Cristina Clark*, 94-INA-508 (Oct. 31, 1996). We therefore reject Employer's argument.

Employer further indicates that, subsequent to the NOF, it attempted to contact all the applicants via certified mail and that none of the applicants contacted Employer. (AF 159). If an employer attempts to contact an applicant after the CO alleges that the applicant was not contacted or interviewed, or was rejected, the fact that the employer shows that the applicant is now unavailable does not cure the initial violation. *See Kamal's Middle Eastern Specialties*, 95-INA-167 (Dec. 19, 1996) (reasoning that an employer could not cure an initial violation of the regulations by offering the position to the applicant after the CO issued the NOF); *Bruce A. Fjeld*, 88-INA-333 (May 26, 1989) (en banc). Employer's belated attempt to contact Mr. Landon and the other applicants fails to demonstrate good faith recruitment.

Because Mr. Landon's resume indicates a reasonable probability that he is qualified, such that his credentials should have been investigated further, and because we find that Employer did not recruit in good faith, we conclude that the CO's denial of certification was proper in this case.

ORDER

For the foregoing reasons, the Certifying Officer's denial of alien labor certification in the above-captioned case is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary of the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.

